

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

OCT 17 2003

RECEIVED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re Gale Norton,

Secretary of the Interior
in her official capacity,

Petitioner.

No. 03-

03-5283

[Civ. No. 1:96CV01285 (RCL)]

PETITION FOR WRIT OF MANDAMUS

INTRODUCTION AND SUMMARY

Pursuant to 28 U.S.C. § 1651 and Rule 21 of the Federal Rules of Appellate Procedure, the Secretary of the Interior respectfully petitions this Court for a writ of mandamus directing the recusal of Special Master Alan Balaran.

The facts giving rise to this petition are quickly summarized. The district court ordered the Special Master to make findings and conclusions with respect to allegedly improper government conduct asserted by Native American Industrial Distributors, Inc. ("NAID"), a government contractor.

On April 21, 2003, the Special Master released a 55-page report which purported to find that the Department of the Interior had withheld material information in filing its Eighth Quarterly Report. The Special Master explained that his Report was based on information "obtained outside of normal channels and to which the parties may have no familiarity." Interim Report of the Special Master Regarding the Filing of Interior's Eighth Quarterly Report

("Interim Report"), at 1 n.1 (Exh. 1). Subsequent inquiry revealed that the unusual channels included the former Vice President of NAID, Mike S. Smith - a complaining witness in this litigation. The Special Master not only consulted with this former NAID officer on an ex parte basis, but put him on his payroll, where, billing records explain, he was paid to assist in drafting and editing the Special Master's report.

Recusal is required under 28 U.S.C. § 455(a) and 28 U.S.C. § 455(b). A reasonable observer would plainly question the impartiality of a judicial officer who works with a complaining witness on an ex parte basis and employs that witness to make far-ranging findings condemning a party's conduct. Indeed, a judicial officer engaging in this type of conduct has abandoned any semblance of objectivity and has demonstrated a fundamental misunderstanding of the judicial role.

The government moved to disqualify the Special Master on May 29, 2003, and has repeatedly sought expedited resolution of that motion. No ruling has issued. In the intervening months, the Special Master has issued reports on his own initiative based on ex parte information, asserted wide-ranging oversight authority to assess whether Interior's information technology systems are secure, and demanded that he be able to interview government employees on an ex parte basis and without providing notice.

On September 26, 2003, the government advised the district court that, absent a ruling by October 15, 2003, it would seek review in this Court. The government explained that such a course would be necessary in light of the ongoing harm resulting from the activities of a judicial officer plainly subject to recusal. It also explained that it was appropriate that this Court be able to consolidate all matters relating to the Special Master's recusal if it wishes to do so. This Court is currently considering several other mandamus petitions seeking the recusal of the Special Master and Judge Lamberth on the basis of ex parte contacts. See e.g., Nos. 03-5048, 03-5049, & 03-5057 (seeking review of order denying recusal, Cobell v. Norton, 237 F. Supp. 2d 71 (D.D.C. 2003)). The Court should be given the opportunity to consider this petition together with the pending petitions.

The need for recusal is plain. We respectfully ask that the Court grant our petition.

STATEMENT

1. Background.

The background of this case is set out in Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003). This suit involves plaintiffs' claim for an accounting of Individual Indian Money ("IIM") accounts held in trust by the Department of the Interior ("DOI"). On December 21, 1999, the district court issued a declaratory judgment holding that the American Indian Trust Fund Management Reform Act

of 1994, Pub. L. No. 103-412, 108 Stat. 4239 ("1994 Act"), requires Interior to provide an accurate accounting of all money in the IIM trust accounts held for the benefit of plaintiffs. Cobell v. Babbitt, 91 F. Supp. 2d 1 (D.D.C. 1999). Because the agency had not yet provided such an accounting, the court remanded the matter to allow DOI the opportunity to come into compliance. The court also retained jurisdiction for five years, and required DOI to file quarterly reports explaining the steps taken to rectify the breaches found. Id. at 56.

On interlocutory appeal, this Court largely affirmed. Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001). The Court recognized the duty to perform an accounting, and also affirmed the district court's decision to retain jurisdiction over the case for five years and to require periodic progress reports, id. at 1109, noting that this relief was "relatively modest," id., and "well within the district court's equitable powers." Id. at 1086. The panel admonished the district court, however, "to be mindful of the limits of its jurisdiction." Id. at 1110.

On remand, the district court held the Secretary of the Interior and an Assistant Secretary in contempt of court and appointed a "Special Master-Monitor," Joseph S. Kieffer, to oversee Interior's trust reform and accounting efforts. On July 18, 2003, this Court reversed the court's contempt order, and, exercising its

mandamus jurisdiction, vacated Mr. Kieffer's appointment as both Court Monitor and Special Master-Monitor. See 334 F.3d at 1140-50.

On September 25, 2003, the district court issued a "structural injunction," modeled on cases in which courts have assumed control over the operations of state prisons and other institutions. Cobell v. Norton, Civ. No. 96-1285, 2003 WL 22211405 (D.D.C. Sept. 25, 2003).

2. The Appointment Of Special Master Balaran.

In 1999, the district court appointed Alan Balaran to serve as a Special Master to oversee discovery. See Order of February 24, 1999 (Exh. 2). Over time, the court expanded his duties in several respects. For example, the court authorized the Special Master to oversee the government's "retention and protection from destruction of IIM records through, among other things, on-site visits to any location where IIM Records are maintained." Order of August 12, 1999 (Exh. 3). Subsequently, it directed the Special Master to review certain plans and conduct certain inquiries with regard to security of individual Indian trust data in computer systems. Order of December 17, 2001 (Exh. 4). The government consented to the assignment of responsibilities as described in those orders.

On September 17, 2002, the court referred to the Special Master, for reports and recommendations, two of plaintiffs' motions seeking to hold "37 non-party individuals" in contempt and to hold Interior Defendants and their counsel in contempt for allegedly

destroying e-mail. See Cobell v. Norton, 226 F. Supp. 2d 1, 162-63 (D.D.C. 2002). Individual petitioners have sought Mr. Balaran's recusal from those proceedings based in significant part on his ex parte contacts. See Nos. 03-5048, 03-5049 & 03-5057 (seeking review of order denying recusal, Cobell v. Norton, 237 F. Supp. 2d 71, 79-85 (D.D.C. 2003)).¹

3. The NAID Report.

Native American Industrial Distributors, Inc. is an information technology, security, management and training firm retained by Interior since 1999, to provide assistance with the Trust Asset and Accounting Management System ("TAAMS"). On August 30, 2002, NAID moved to intervene in this action, alleging that Interior had retaliated against it "in an attempt to silence" efforts by NAID "to accurately report to this Court and others the nature and extent of progress in meeting the requirements of the [1994] Act and of the previous Orders of the Court." Motion of NAID to Intervene at ¶ 3 (Exh. 5). Specifically, NAID alleged that when it gave Interior unfavorable reports on TAAMS project progress in November 2001, Interior purposely disregarded those reports in preparing its Eighth Quarterly Report to the district court. NAID

¹ These mandamus petitions seek the recusal of both Special Master Balaran and the district court judge. Two additional petitioners have sought only the recusal of the district court judge. See Nos. 03-5047, 03-5050. This Court consolidated briefing on these petitions and directed plaintiffs to file a response. Petitioners' joint reply is due on October 20, 2003.

alleged that Interior then retaliated against it by "substantially" reducing the scope and value of its contract, see Verified Motion of Intervenor NAID for Temporary Restraining Order, Preliminary and Permanent Injunctive Relief, at ¶ 38 (Exh. 6), and by assigning the work instead to another Interior contractor, Electronic Data Systems Corporation ("EDS"), which had allegedly reported more favorably on TAAMS progress. Id. at ¶ 40.

Mike S. Smith, a NAID employee and a member of the TAAMS Project Team, was one of the principal witnesses to the events described in NAID's motion to intervene. He was an NAID employee when NAID filed its motion, and he was NAID's Executive Vice President as of January 2003. See Letter from Mike Smith, Executive Vice President of NAID, to Carl Hotubbee, as of January 2003, Department of the Interior (January 7, 2003) (Exh. 16).

On September 24, 2002, the district court denied NAID's motion to intervene on procedural grounds. However, in a letter dated October 7, 2002, the Special Master informed Interior's counsel that the "Court directed me to investigate whether the Department of the Interior withheld any information provided by NAID." Letter from Special Master Balaran to Peter Miller, at 1 (Exh. 7).

The court apparently instructed Mr. Balaran to begin a new investigation in an off-the-record communication. After the government declined to produce documents requested by the Special

Master in the absence of an order authorizing the investigation, the Court issued an order of appointment:

The Court wishes to ascertain whether there is any validity to NAID's contention that the Department of the Interior withheld information from the Court that should have been disclosed in the Eighth Quarterly Report; and is directing the Special Master to investigate whether Interior engaged in any such concealment.

November 5, 2002 Order, at 1 (Exh. 8). The Order provided that "the Special Master shall file with the Court, with copies to defendants' and plaintiffs' counsel, his report and recommendation detailing his findings and conclusions." Id. at 1-2.

On April 21, 2003, the Special Master filed the Interim Report (Exh. 1). The Report purported to find that the government had withheld material information in filing its Eighth Quarterly Report. The Report was not based on evidence received from the parties. To the contrary, the Report acknowledged at the outset that its findings were based on information "obtained outside of normal channels and to which the parties may have no familiarity." Interim Report at 1 n.1 (Exh. 1).²

The Interim Report does not explain precisely what "channels" the Special Master relied upon, and the government is unaware, at this time, of the precise breadth of his ex parte contacts. The Special Master's billing records reveal, however, that Mr. Balaran had extensive ex parte contacts with the former Executive Vice

² The government has responded to the substance of the Interim Report in district court. See Dkt. # 2057.

President of NAID, Mike S. Smith, and that the Special Master, in fact, engaged Mr. Smith to assist in the preparation of his Report and paid him for his work. The Report was released immediately to the public, and plaintiffs filed it with this Court on the following day in connection with the government's then-pending appeal, offering it as evidence of misconduct by the government. See Letter From Elliott Levitas to Mark Langer, Clerk, Court of Appeals (April 22, 2003) (Exh. 9).

The March 2003 Report of the Special Master, submitted on April 1, 2003, contains Invoice #35, which identifies numerous charges for work done on the investigation by Mr. Smith, identified as "MSS." See Invoice #35 (Exh. 10), entries for 2/27/03, 3/5/03, 3/6/03, 3/12/03, 3/13/03, 3/14/03, 3/18/03, 3/19/03, 3/20/03, 3/21/03, 3/26/03, 3/27/03.³ The charges on Invoice #35 for "MSS" total 65.30 hours and \$8,815.50.

³ Mike Smith accompanied the Special Master during a February 27, 2003 inspection of the collection of documents at Interior responsive to the October 7, 2002 requests from the Special Master. Mr. Smith's presence at this inspection, with Interior's counsel also present, did not itself seem remarkable. As one of the principal NAID employees and a TAAMS Project Team member he had previously seen all of the requested documents and could presumably point out to the Special Master, in the presence of government counsel, which documents were relevant to NAID's allegations that were under investigation. The Special Master did not reveal at that inspection, or at any other time, that Mr. Smith had been employed by the Special Master or that he planned to employ him for assistance with the investigation, or that he planned to meet ex parte with Mr. Smith. The February 27, 2003 inspection is the first reported charge for "MSS" identified in the Special Master's invoices.

Invoice #37 to the April 2003 Report of the Special Master also lists numerous charges for work on the Interim Report by "MSS." See Invoice #37 (Exh. 11), entries for 3/31/03, 4/1/03, 4/2/03, 4/3/03, 4/4/03, 4/5/03, 4/6/03, 4/7/03, 4/8/03, 4/9/03, 4/11/03, 4/14/03. In addition, Invoice #37 contains charges for the Special Master's assistant, Ed Volz (identified as "EKV" on the invoice), for work on the Interim Report in association with "Mike Smith." See, e.g., Invoice #37 (Exh. 11), entries for 4/6/03, 4/7/03, 4/8/03, 4/9/03, 4/10/03, 4/11/03, 4/15/03, 4/16/03. The charges submitted for "MSS" in Invoice #37 total 44.39 hours and \$5,992.65. The "MSS" charges in these two invoices for work done on the Special Master's investigation and for preparation of the Interim Report total 109.69 hours and \$14,808.15. See Exh. 12 (containing a list of the charges submitted for Mike S. Smith).

The billing records indicate that Mr. Smith actually drafted and edited portions of the Interim Report. See, e.g., Invoice #37 (Exh. 11), entries for 4/3/03 ("MSS Draft 8th QR analysis"), 4/4/03 (same), 4/15/03 ("EKV Assist the Special Master and Mike Smith editing report on the 8th Quarterly Report"), 4/16/03 ("EKV Assist Mike Smith editing and organizing materials for report on the 8th Quarterly Report").

4. Events Subsequent To The NAID Report.

On May 29, 2003, the government moved to recuse the Special Master. On June 24, 2003, the government moved for expedited

consideration. On September 26, 2003, the government again moved for expedited consideration, and informed the district court that it would seek review in this Court if no ruling was forthcoming by October 15, 2003. See Exh. 13.⁴

Since the filing of the government's recusal motion, the Special Master has continued to issue reports on his own initiative, asserting "'the authority of institutional reform special masters to uncover facts and collect evidence via ex parte contacts with parties and counsel.'" See Site Visit Report of the Special Master to the Dallas, Texas Office of the Minerals Revenue Management Division of the Department of the Interior's Minerals Management Service (undated), at 1 (Exh. 15) (quoting Order of March 29, 2002 (dkt. # 1235), cited in Cobell v. Norton, 237 F. Supp. 2d 71, 75 (D.D.C. Jan. 17, 2003)). See also Site Visit Report Of The Special Master To The Office Of Appraisal Services In Gallup, New Mexico And The Bureau Of Indian Affairs Navajo Realty Office In Window Rock, Arizona (Aug. 20, 2003), at 38 (dkt. #2219) (Exh. 14) (purporting to examine claimed disparity between rates earned by allottees on rights of way over their property, and those earned by tribes and private parties, and concluding that "the Secretary and her delegates have abrogated these responsibilities"

⁴ The Special Master has not indicated that the government has misunderstood his billing records in any respect.

to ensure "that the appraisal process is conducted in a manner both competent and beyond professional reproach").

Further, a longstanding disagreement over the terms pursuant to which the Special Master would be permitted to conduct confidential "penetration testing" of Interior's computer systems led to the issuance of a temporary restraining order in late June, 2003, followed by the entry of a preliminary injunction one month later. See Cobell v. Norton, 274 F. Supp. 2d 111, 114-25 (D.D.C. July 28, 2003) (describing dispute over "rules of engagement" for penetration testing and Special Master's accusations of government misconduct). The government has appealed from the injunction. See No. 03-5262 (D.C. Cir.).

REASONS WHY THE PETITION SHOULD BE GRANTED

A. Every litigant has a basic right to "a neutral and detached judge." Ward v. Village of Monroeville, 409 U.S. 57, 62 (1972). This right is protected by statutory provisions and by the Code of Judicial Conduct, which create strict and objective standards for recusal.⁵ Recusal is required whenever a judge's impartiality "might reasonably be questioned." 28 U.S.C. § 455(a). This provision requires neither a showing of subjective bias nor,

⁵ Section 455 of Title 28 largely tracks Canon 3(C) of the Code of Judicial Conduct, and Congress intended that the standard for disqualification under 28 U.S.C. § 455 be "virtually identical" to the ethical standard of Canon 3(C). See H.R. Rep. No. 93-1453, reprinted in 1974 U.S.C.C.A.N. 6351, 6353. See also Hall v. SBA, 695 F.2d 175, 178 (5th Cir. 1983).

indeed, a showing that actual bias exists. "The standard for disqualification under § 455(a) is an objective one[;] [t]he question is whether a reasonable and informed observer would question the judge's impartiality." United States v. Microsoft Corp. ("Microsoft II"), 253 F.3d 34, 114 (D.C. Cir.), cert. denied, 534 U.S. 952 (2001); see Liteky v. United States, 510 U.S. 540, 548 (1994) (holding that grounds for recusal must "be evaluated on an objective basis, so that what matters is not the reality of bias or prejudice but its appearance"). Thus, a judge need not have actual bias or even be aware of the facts creating an appearance of impropriety "so long as the public might reasonably believe that he or she knew" of such facts. Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 860 (1988).

Section 455(b) requires recusal whenever a judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding[.]" 28 U.S.C. § 455(b)(1). Section 455(b)(1) requires recusal where the official has "a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess . . . or because it is excessive in degree." Liteky, 510 U.S. at 550.

In its most recent decision in this case, this Court made clear that judicial officers, including special masters, must

adhere to the ethical precepts established by section 455. Cobell v. Norton, 334 F.3d 1128, 1144 (D.C. Cir. 2003) (citing Jenkins v. Sterlacci, 849 F.2d 627, 630-32 & n.1 (D.C. Cir. 1988)). And, in vacating the appointment of Joseph Kieffer as both a Court Monitor and a "Special Master-Monitor" in this case, this Court emphasized that the issue of recusal is properly reviewed in the exercise of the Court's mandamus authority. Cobell, 334 F.3d at 1139-40.

B. Rarely have the grounds for recusal been presented more starkly than in the present case. The district court directed the Special Master to investigate charges of concealment brought to the Court by NAID in connection with its claim of improper contract termination. The court declared that it wished to ascertain the validity of "NAID's contention that the Department of the Interior withheld information from the Court that should have been disclosed in the Eighth Quarterly Report." November 5 Order, at 1 (Exh. 8). Accordingly, the Court provided that "the Special Master shall file with the Court, with copies to defendants' and plaintiffs' counsel, his report and recommendation detailing his findings and conclusions." Id. at 1-2 .

In an extraordinary departure from fundamental principles of judicial conduct, the Special Master undertook to assess the truth of NAID's allegations by hiring NAID's former vice president and principal complaining witness. Having assumed the paradigmatic judicial role of considering and evaluating evidence and of making

findings and conclusions, the Special Master could not properly engage in any ex parte contacts. Still less could he engage in contacts with the former officer of a complaining party. Even more clearly, he could not ask such a person to draft or edit portions of his report and pay him to do so. Indeed, the prospect of a judicial officer engaging in such conduct would be scarcely conceivable if the Special Master had not, in fact, done so.

The extraordinary nature of the Special Master's conduct is underscored by a letter written by Mike Smith on January 7, 2003, during the course of the Special Master's investigation. Mr. Smith, who at this time was still Executive Vice President of NAID, wrote to Interior regarding NAID's pending contract dispute with Interior. Mr. Smith copied the letter to "Alan Balaran, Special Master." See Letter from Mike Smith, Executive Vice President of NAID, to Carl Hotubbee, Contracting Officer, Department of the Interior (January 7, 2003), at 2 (Exh. 16). In this letter, Mr. Smith declared:

[W]e have retained the services of counsel because we are dealing with a government agency that is refusing to negotiate with us in good faith. Rather, we have been the target of retaliation; allegations of which are still under investigation by the Court Appointed Special Master.

Id. at 1. Mr. Smith's letter highlights NAID's direct financial interest in the outcome of the Special Master's report and leaves no doubt that its interests were directly opposed to those of Interior. It also leaves no doubt as to Mr. Smith's own views.

Nevertheless, within a few months, the Special Master had transformed Mr. Smith from a witness party charging the government with bad faith and retaliation into a confidential associate and compensated draftsman. That the Special Master should have thought it appropriate to solicit Mr. Smith's views off-the-record or to engage him in any capacity signals a misunderstanding of his role so profound as to preclude him from acting as a judicial officer in this case. Any reasonable observer would question the impartiality of a judicial officer who collaborated with the former officer of an interested party to discredit a defendant and expose it to charges of contempt or fraud. Thus, recusal of the Special Master is required under 28 U.S.C. § 455(a).

Recusal is also required under section 455(b). A judicial officer who publicly levels grave charges against a defendant on the basis of ex parte communications with hostile witnesses has abandoned any pretext of objectivity. Indeed, apart from anything else, the Special Master's decisions to engage Mr. Smith and to publicize his "interim report" indicate a wholly improper willingness to pre-judge Interior's conduct and to subject it to public attack without giving Interior the opportunity to see or respond to the evidence procured "outside of normal channels." Interim Report at 1 n.1 (Exh. 1).

The impropriety of the Special Master's conduct can be gauged by comparison to other cases in which recusal has been required.

Recusal on the basis of ex parte contacts is required even when a judicial officer obtains knowledge only from impartial experts. As the Seventh Circuit explained in In re Edgar, 93 F.3d 256 (7th Cir. 1996), cert. denied, 519 U.S. 1111 (1997), with regard to a judge's conversations with an expert panel, "personal knowledge" means information derived outside the record and not subject to adversarial testing. The court emphasized that "[t]he point of distinguishing between 'personal knowledge' and knowledge gained in a judicial capacity is that information from the latter source enters the record and may be controverted or tested by the tools of the adversary process." Id. at 259. "Knowledge received in other ways, which can be neither accurately stated nor fully tested, is 'extrajudicial.'" Ibid.

Certain very limited ex parte procedures may be appropriate, as when a judge must determine how to treat sensitive information. See Clifford v. United States, 136 F.3d 144 (D.C. Cir. 1998). But we are aware of no precedent that would permit ex parte contacts of the kind at issue here. See United States v. Microsoft Corp. ("Microsoft I"), 56 F.3d 1448, 1464-65 (D.C. Cir. 1995) (case should be reassigned when, among other things, a district court formed views based on his reading of a book and accepted ex parte submissions, even though the court stated it had not considered the ex parte material); see also Microsoft II, 253 F.3d at 114. The Special Master's willingness to obtain and then publicize ex parte

evidence together with the views formed on the basis of that evidence is far more egregious than the conduct that compelled reassignment in either Microsoft I or Microsoft II.

As this Court has emphasized, it is a "cardinal principle of our system of justice that factual disputes must be heard in open court and resolved through trial-like evidentiary proceedings." Microsoft II, 253 F.3d at 101. In making findings and conclusions of deliberate concealment on the basis of evidence obtained "outside of normal channels and to which the parties may have no familiarity," Interim Report at 1 n.1, the Special Master turned his back on the most basic precepts of judicial conduct.

C. The need for recusal cannot be eliminated by subjecting the Special Master's factual findings to de novo review. Cf. Cobell v. Norton, 237 F. Supp. 2d 71, 84-85 (D.D.C. 2003).⁶ In concluding that special masters are judicial officers subject to the same disqualification standards as judges, this Court has explained that, "[g]iven the complexities of the issues special masters are frequently called upon to sort out, the closely disputed issues of fact they must resolve in the first instance, and the 'clear error' standard governing the court's review of their findings, the district court's oversight of a special master

⁶ Indeed, the district court has not shown a predisposition to review reports by the Special Master in a neutral fashion. See e.g., Trial Transcript (May 28, 2003, P.M.), at 127-28 (Exh. 17) (describing the Interim Report as "the Special Master's report on whatever the latest lie is").

falls far short of plenary 'control'" Jenkins, 849 F.2d at 631. This Court did not suggest that a Special Master whose impartiality might reasonably be questioned could continue to make proposed findings and conclusions as long as they were subject to a de novo standard of review. Plainly, the application of de novo review would not allow a court to appoint a special master without regard to his financial or other interests in the litigation. No party should be adjudged by a biased judicial officer, whatever standard of review may later be applied to his actions. The efficacy of such review can never be certain. Where a special master has relied on non-record materials and ex parte contacts with a clearly interested party, effective review is rendered all but impossible.

The Special Master's departure from settled principles governing adjudication in the federal courts strikes at the heart of the judicial process. The district court cannot properly obtain advice from the Special Master, whatever standard of review is applied to his recommendations. A judge may not, after all, disregard his law clerk's involvement with a case or its parties, even though the law clerk's advice is given no deference at all. See, e.g., Parker v. Connors Steel Co., 855 F.2d 1510 (11th Cir. 1988), cert. denied, 490 U.S. 1066 (1989) (recusal required where, inter alia, judge's law clerk was son of partner in firm handling litigation); Byrne v. Nezhat, 261 F.3d 1075 (11th Cir. 2001)

(recusal not required where judge isolated law clerk from case involving past employer).

D. The government moved for the Special Master's recusal on May 29, 2003. As this Court has observed, the harm incurred by permitting the continued activity of a Special Master who should properly be recused is "irreparable." Cobell v. Norton, 334 F.3d at 1139. It is magnified here by the Special Master's insistence that he may be able to investigate any subject of his choosing on an ex parte basis, followed by reports based on evidence that was not submitted by the parties or even known to them. Despite this Court's admonitions, the Special Master has shown untempered determination to assume an "investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system." Id. at 1342. Recusal is thus required.

CONCLUSION

This Court should grant the petition and direct that Special Master Balaran be disqualified from acting in any capacity in this case.

Respectfully submitted,

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OCTOBER 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of October, 2003, I am causing the foregoing Petition for Writ of Mandamus to be served on the following in the manner specified:

By hand delivery:

The Honorable Royce C. Lamberth
United States District Court
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Washington, D.C. 20001

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CHARLES W. SCARBOROUGH

CERTIFICATE AS TO PARTIES AND AMICI

Pursuant to Circuit Rules 21(d) and 28(a)(1)(A), undersigned counsel certifies that the named plaintiffs in this action are Elouise Pepion Cobell, Earl Old Person, Mildred Cleghorn, Thomas Maulson, and James Louis LaRose. The district court has certified a plaintiff class consisting of present and former beneficiaries of Individual Indian Money ("IIM") accounts, excluding those who had filed their own actions prior to the filing of the complaint in this case.

Defendants are Gale A. Norton, Secretary of the Interior, Aurene M. Martin, Acting Assistant Secretary of the Interior for Indian Affairs, and John W. Snow, the Secretary of the Treasury.



CHARLES W. SCARBOROUGH